

LIEW CHEE TAT v. LOK MOON & ORS.

[A.C.J. (Sharma J.) May 3, 1972]

[Ipoh — Civil Appeal No. 23 of 1971]

Practice and Procedure — Appeal — Notice of — Delay in service on respondent — No application or attempt made to extend time or excuse the delay — Discretion of court — Subordinate Courts Rules, 1950 O. 39.

This was an appeal against the order of the learned president made on June 3, 1971. The notice of appeal was filed on June 5, 1971, but was not served on the third and fourth respondents until July 24, 1971. The appeal against the first and second respondents had, however, already been withdrawn and dismissed.

It was agreed that June 17, 1971 was the last day for the filing of the notice of appeal under the provisions of O. 39 r. 2(3) of the Subordinate Courts Rules. On July 15, 1971, the grounds of judgment were supplied to the solicitors for the appellant.

It was argued on a preliminary objection, that since no notice of appeal had been served on the third and fourth respondents on or before June 17, 1971, the present appeal had not been properly brought before the court.

Held, dismissing the appeal: since no application or attempt had been made to urge upon the court that in the circumstances the delay, if any, should be excused or time extended for effecting such service or to correct the position the court was disinclined to exercise its discretion in favour of a party that is reluctant to own a mistake. Therefore, as the question of the exercise of any discretion had not arisen, the objection consequently would succeed.

Case referred to:-

- (1) *The New India Assurance Co. Ltd. v. Karam Singh* (Muar Civil Appeal No. 1 of 1970) unreported.

MAGISTRATE'S CIVIL APPEAL.

Phillip Leong for the appellant.

Peh Swee Chin for respondents Nos. 3 and 4.

Sharma J. (delivering oral judgment): This appeal affects only the third and the fourth respondents and I need not mention the defects in the notice of appeal which was filed and which relate to unnecessarily making the first two respondents as parties to this appeal as also to the fact that neither the memorandum of appeal nor the appeal record nor the notice of hearing was at any time served on them. Again I do not desire to dwell on another defect in the heading of the notice of appeal and the subsequent memorandum of appeal in which the appellant has without any order of the court added parties to the civil action. There were in fact two separate civil actions brought by Lok Moon and Low Wai Fong (f) in the sessions court and they were at no stage made co-plaintiffs. The appeal against the first and second respondents has, however, already been withdrawn and dismissed.

A preliminary objection has been raised by Mr. Peh, counsel for the third and fourth respondents. This appeal is against the order of the learned president made on 3rd June, 1971. The notice of appeal was filed on 5th June, 1971. The notice of appeal was not served on the third and fourth respondents until 24th July, 1971. It is agreed that 17th June, 1971 was the last day for the filing of the notice of appeal under the provisions of Order 39 r. 2(3) of the Subordinate Courts Rules. The grounds of judgment were supplied to the solicitors for the appellant on 15th July, 1971. The argument put forward by the

A learned counsel for the two respondents is that no notice of appeal having been served on him or his clients on or before 17th June, 1971, the present appeal has not been properly brought before the court. Order 39 r. 2(1) of the Subordinate Courts Rules reads:

"Appeals to the High Court shall be brought by giving notice of appeal in Form 39."

B Form 39 itself requires the notice to be addressed to the respondent and although O.39, r.2(3) requires the notice to be filed within fourteen days from the date of the making of the order, O.39 r.2(6) is silent on when the said notice of appeal is required to be served on the parties affected by the appeal. I had the occasion to deal with a similar matter in Muar Civil Appeal No. 1 of 1970 (*The New India Assurance Co. Ltd. v. Karam Singh*⁽¹⁾). I said there:

C "O.39 r. 2(3) does not speak of the service of the notice of appeal on the respondent but only of the filing of such notice of appeal within the prescribed period of fourteen days. However, sub-rule (6) of rule 2 of the same order goes on to say that 'the notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors'. It has been urged upon me at some length that sub-rule (6) and sub-rule (3) of Order 39, rule 2 of the Subordinate Courts Rules should be read together and that on the analogy of either the rules relating to civil appeals in the Federal Court or to the filing of the memorandum of appeal in case of appeals from the subordinate courts under Order 59 of the Rules of the Supreme Court, it should be held that the notice of appeal should also have been served within the period of fourteen days. ... Certain cases have been cited to me in support of that contention. The first was the case of *Tan Ting Kok v. Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153. That was an appeal from the High Court and the Federal Court there was only interpreting the effect of rule 7 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 which expressly provides that notice of appeal is to be served at the same time as the filing of the notice of appeal. The Federal Court followed and confirmed what was decided in *Gurbachan Singh v. Seagrott & Campbell* [1962] M.L.J. 370. *Gurbachan Singh's* case dealt with Order 58 as it stood before the Federal Court (Civil Appeals) (Transitional) Rules, 1963 came into force but in those two cases the Federal Court was dealing with an express provision of the Rules which required that the notice of appeal was to be served at the time of the filing of the notice of appeal and that no appeal except by special leave could be brought after the expiration of the period prescribed. O. 39 r. 2(6) of the Subordinate Courts Rules places no such duty on the appellant to serve the notice of appeal on the respondent at the same time as he files the notice of appeal in the subordinate court. In any event, it is already more than 18 months that the notice of appeal was in fact filed in court and a copy thereof in fact later served on the respondent. No prejudice whatsoever could have been possibly caused to the respondent by the service effected on him.... I therefore rule that although the notice of appeal was served on the respondent more than fourteen days after the filing of the notice of appeal, it has, in fact, been served on the respondent within a reasonable time. The object of the notice of appeal is only to give notice to the respondent that an appeal has been lodged against the order appealed from and that object was fully accomplished. The defect was only an irregularity (See Order 71 rule 1 of the Rules of the Supreme Court). I should, however, not be taken to mean that the appellant can serve a copy of the notice of appeal on the respondent at any time he chooses. There seems to be a defect in our Rules but that does not mean that the appellant should, because of that defect, suffer. It is, I think, virtually impossible to serve the respondent with the notice of appeal at the same time as it is filed in court unless a meaning is given to the words 'at the same time' which those words do not strictly convey."

In the Muar appeal the notice of appeal was served on the respondent fourteen days after what was said to be the last day for service. In the present case the notice of appeal was served on the respondents one month and seven days after the last day prescribed for filing it in court. The view of the learned counsel for the appellant seems to be that no application for extension of time is required and that the service of the notice of appeal effected on the respondents on 24th July, 1971 is absolutely valid and good in law as there are no restrictions imposed upon the appellant under O. 39, r. 2(6). The appellant's counsel was duly notified by the counsel for the two respondents that the service of the notice of appeal was accepted only under protest and that at the hearing of the appeal an objection would be taken to the maintenance of the appeal. Cases no doubt should be heard and decided on merits and not on technicalities of procedure *alone*. Rules are, however, meant to be observed, followed and respected. I am unable to accept the interpretation put on O. 39, r. 2(6) by the learned counsel for the appellant as the effect of that would be that the notice of appeal could be served on the respondents along with the memorandum of appeal and the appeal record. It could as well be urged that there was no necessity to serve the notice of appeal if the appeal record was duly served and contained (as it always must) a copy of the notice of appeal. Carried to its logical, though extreme, conclusion, the argument could land oneself in the situation where the appellant could with immunity say that the notice of appeal could be served on the day of the hearing of the appeal or even afterwards. This to me is absurd and obviously against the intention of the framers of the Subordinate Courts Rules. It is not without regret that I have to say that no application or attempt has even now been made to urge upon the court that in the circumstances the delay, if any, should be excused or time extended for affecting such service or to correct the position so that the appeal could be heard on its merits. Maybe the appeal has merits. The learned counsel seems to insist upon the correctness and the firmness of his stand and seems to have thrown away the scabbard. The courts generally are disinclined to exercise their discretion in favour of a party that is reluctant to own a mistake. The question of the exercise of any discretion has not arisen. The objection consequently succeeds and the appeal is on that ground dismissed with costs.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong; Peh Swee Chin.*

A LEE CHIN HOCK v. PUBLIC PROSECUTOR

[F.C. (Suffian, Gill and Ong Hock Sim F.J.J.) May 4, 1972]

[Kuala Lumpur — Federal Court Criminal Reference

No. 6 of 1971; Malacca Criminal Appeal No. 15 of 1971]

Internal Security Act, 1960, ss. 22, 25 & 57 — Possession of prohibited documents or publications without lawful excuse — Onus of proof.

B *Criminal Law and Procedure — Reference made to Federal Court on a question of law of public interest — Courts of Judicature Act, 1964, s. 66.*

Evidence — Burden of proof — Without lawful excuse — Evidence Ordinance, 1950, ss. 105 and 106.

C This was a reference under section 66 of the Courts of Judicature Act, 1964, on the application of the accused, the appellant herein, reserving for the decision of the Federal Court, a question of law of public interest, the question being: "In a prosecution for an offence under section 25(1) of the Internal Security Act No. 18/60 whereby 'any person who without lawful excuse has in his possession any document or publication the possession of which is prohibited...' do the words 'without lawful excuse' place the onus of such fact on the accused person or does it still lie with the prosecution?"

D The facts giving rise to this reference appear sufficiently from the judgment below.

Held: (1) "lawful excuse" is not defined in section 25(1) of the Internal Security Act, 1960, and it is impossible for the prosecution to anticipate and rebut in advance, any explanation the accused person may offer in exculpation. Thus, in the absence of a definition of "lawful excuse", it is open to the accused to tender any sort of excuse, however fanciful and flimsy, the legality or sufficiency of which is to be determined by the court. This is peculiarly within the knowledge of the person charged and section 106 of the Evidence Ordinance clearly applied in that the burden of proving that fact was on the appellant. Therefore, it was not for the prosecution to prove the absence of lawful excuse;

F (2) however, the fact that section 57 of the Internal Security Act, by express words, places the onus of proving the presence of lawful excuse on a person charged with having in his possession without lawful excuse fire-arms, etc., did not affect the answer to the question posed in this reference because those express words were put in by the legislature *ex abundanti cautela*. In the result the order of the High Court directing that the case be sent back to the learned magistrate to call on the accused for his defence, must be affirmed.

Cases referred to:-

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- (1) *Public Prosecutor v. Yeoh Siew Beng* [1965] 1 M.L.J. 119.
 - (2) *R. v. Turner* 105 E.R. 1026 at p. 1028.
 - (3) *R. v. Stone* 102 E.R. 247 at p. 253.
 - (4) *Busu v. Public Prosecutor* [1948-49] M.L.J. Supp. 140, C.A.
 - (5) *Abdul Manap v. Public Prosecutor* [1952] M.L.J. 140, C.A.
 - (6) *Williams v. Russell* 141 L.T.R. 190 at p. 191.
 - (7) *Public Prosecutor v. Lim Kwai Thean* [1959] M.L.J. 179 at p. 180.
 - (8) *Emperor v. Dahyabhai Savchand Jhaveri* A.I.R. (1941) Bom. 273.

FEDERAL COURT.

I F. H. D'Cruz for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim F.J. (delivering judgment of the court): This is a reference under section 66 of the Courts of Judicature Act, 1964, on the application of